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No. 80-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE ROMAN CATHOLIC CHURCH OF THE ARCHDIOCESE OF NEW ORLEANS: THE CONGREGATION OF ST. JULIAN EYMARD CATHOLIC CHURCH, AND BROTHERS OF THE SACRED HEART (BROTHER MARTIN HIGH SCHOOL),

Respondents,

versus

STATE OF LOUISIANA, DEPARTMENT OF LABOR, OFFICE OF EMPLOYMENT SECURITY,

Petitioner.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Louisiana

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision of the Louisiana First Circuit Court of Appeal, which the Louisiana Supreme Court declined to review, determined a federal question regarding the validity of the Louisiana Unemployment Security Law (R.S. 23:1472, et seq.), and thereby, under 28 U.S.C. 1275(3), conferred jurisdiction on this Honorable Court.

2. Whether, should the Court find that the decision of the Louisiana Court involves issues of statutory construction of the Federal Unemployment Tax Act, 26 U.S.C. 3301, et seq., that law required inclusion of elementary and secondary schools owned and/or operated by churches and religious organizations within the scope thereof.

3. Whether, should the Court find that the Federal Unemployment Tax Act, 26 U.S.C. 3301, et seq., was expressly intended to extend coverage thereof to elementary and secondary schools owned and/or operated by churches and/or religious organizations, such inclusion violative of the Religion Clauses of the First Amendment to the United States Constitution.

PARTIES TO PROCEEDING

The petition correctly sets forth the parties to this proceeding.

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OPINIONS BELOW

The Petition for Certiorari correctly sets forth the opinions below. Respondents would only supplement the Petition by providing the Court with the citation of the denial of writs or review by the Louisiana Supreme Court, which is reported at 394 So.2d 607.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The state and federal constitutional and statutory provisions at issue herein are adequately set forth in the Petition and Appendices thereto.

JURISDICTION

The jurisdictional basis for this petition is fairly set forth in the Petition. Respondents, however, contend that the Court is without jurisdiction under 28 U.S.C. 1257(3) for reasons as set forth herein.

STATEMENT OF THE CASE

Petitioner essentially states the case to the Court correctly; however, Respondents deem it appropriate to elaborate on certain facts and issues determinative of the case below.

Catholic elementary and secondary schools within the State of Louisiana meet the two-fold test for exemption of religious organizations under the Louisiana statute; i.e., these schools "are operated primarily for religious purposes and operated, supervised and controlled or principally supported by a church."

All elementary and secondary Catholic schools in the State of Louisiana are either owned and controlled by a separate parish corporation or, in some instances, are owned by the Diocese itself as a non-profit Louisiana corporation. The title to all land, buildings and improvements comprising the elementary or secondary school are vested in the church corporation, and none of these schools are separately incorporated from either the parish or the Diocese. It was further stipulated that all Catholic schools within the State are ultimately subject to policies regarding their operation as set forth by the Archbishop or Bishop of the respective Archdiocese or Dioceses.

Furthermore, in addition to those elementary and secondary schools which are owned or operated by the respective Archdiocese or Diocese or Parishes of the Catholic church within the State of Louisiana, there also exist secondary or high schools within the state which are operated, owned and controlled by religious communities, or orders, of priests, brothers or sisters.

These schools are owned, operated, controlled and conducted under the auspices of these various religious orders in essentially the same manner as the Brother Martin High School, which is owned, operated and controlled by the order of brothers known as the Brothers of the Sacred Heart, a Respondent herein.

This pattern of ownership and governance is not only characteristic of the Catholic School, but is generally typical of virtually all denominational schools, including those operated by the Respondent-Intervenors.

The stipulation of fact between Respondent Trinity Heights Baptist Church and the State is found at pages 69 through 73 of the Application for Writ of Certiorari to the Louisiana Supreme Court and that stipulation very clearly proves, for all purposes of this case, that Trinity is a religious non-profit tax exempt corporation formed in 1941; that in 1970, Trinity created a private school to be operated by the Church. The School is a part of the church and not a separate entity. The school is operated by the church through its Education Committee. The school is located on property owned by the church. All school buildings are owned by the church.

The church, through its Education Committee employs the Principal and Assistant Principal and supervises the employment of teachers by the Princi-

pal. One must believe in Jesus as Savior and in the Bible as the divinely inspired Word of God and must give an account of an experience of salvation to become a teacher. Bible instruction is required for graduation, religious instruction is daily taught and chapel attendance is required.

The church pays all payroll and other bills for both church and school from one account. The church establishes the school budget and guides and directs the school in all affairs.

Facilities, including buildings, athletic facilities, movable property, including buses, are shared by church and school.

The stipulation, detailed in Respondent Trinity's brief in reply to the intermediate State Appellate Court, contained at pages 190 through 206 of the application (particularly pages 196-202) is significant. The substance thereof reveals that Church minutes establishing the school stipulate that it be owned and controlled by the church, the purpose to be for Christian Education, all employees to be Bible believing Christians who are born again. The Bylaws for the school operation reflect it to be a part of the Christian ministry of Trinity, the school being subject to all church policy; the objective of the school being to combine Christian Gospel with fundamental knowledge, with the Bible and Christian principles to be taught in every aspect of the curriculum. The Handbook and curricu-

lum of the school demonstrate the basic Christian concept and purposes of the school, that being to provide a quality Christian education teaching the absolute truths of God. The school is stated in the curriculum to be a ministry of the church.

In addition to the foregoing, the Pastor of the church and the school and the Principal of the school testified as to all facets of the school being under the control and operation of the church to the end that the school is simply an additional function of the church.

Similarly, the record below reveals the same to hold true for Respondent-Intervenor, St. James Episcopal Church.

St. James Episcopal School is not a separate legal entity. It is simply one of the programs of St. James Episcopal Church (a Louisiana non-profit corporation) like the Sunday School program or the ministry to the elderly. The school is governed by the Rector and Vestry of St. James Episcopal Church.

The school was founded in the 1940's not only to provide quality education in basic skills but also to guide children to live and to develop values according to the Christian Religion. That teaching mission is taken seriously at St. James. The school has grown so that, although 80 percent of the children of St. James attend the school, they occupy only one-third of the seats so that two-thirds are open to other families in the com-

munity. By this means, the church reaches out to extend Christian influence beyond its own members.

The fact that the teaching mission is taken seriously by the Episcopal Church is demonstrated by the extent of the Church's educational activities. The Episcopal Church in the United States has only a little over two million communicants. There are, however, parochial schools operated as part of the mission and ministry of Episcopal Parishes in all states in the union. There are 165 secondary schools owned and operated by the Episcopal Church in the United States, in which are enrolled 98,000 students. The Episcopal Church also owns eight colleges.

The physical facilities the school occupies are owned by the Church. The school classrooms are in the same building which is used for Sunday School. The school also uses the Church's cafeteria, the Church's open areas for playgrounds, the facilities in the Church's Parish House for plays and other special meetings, and other Church facilities. The school also operates eight school buses, title of which is in the name of St. James Episcopal Church.

St. James Episcopal School is funded primarily by tuition that the children's parents pay. It is also, however, subsidized by the Church, since the Church provides housing for the school (which is a significant expense), pays for utilities, takes care of major repairs to the building, etc.

Some of the same individuals perform services for both the Church and the school. Several school teachers teach in other education programs of the Church such as vacation Bible School and Sunday School. Members of the janitorial staff work for both the Church and the school, as do the maids in the kitchen.

Worship is an integral part of the school program. Attendance at weekly chapel is compulsory for all students. Prayers are offered each morning at the start of school. A blessing is said before lunch. The building in which the school is housed contains a chapel, and the students also use the main church and a chapel in the Parish House. Religious art, crosses and other religious symbols are located throughout the school.

Religious instruction is likewise an integral part of the school program. The Rector and other priests at the Church have developed a religious curriculum which is taught by the priests at the school. As the Rector, Father Coleman, testified, "the curriculum, we believe, not only teaches the Bible as content, but it also teaches it as a sacred truth, as revealed truth . . ." The curriculum is a continuing one that picks up with the first grade and continues on an organized basis through the fourth grade. Religious instruction is compulsory for all students.

In addition to the formal religious instruction given by the priests, the curriculum has a substantial religious content. In the pre-kindergarten and kinder-

garten group, the children have chapel twice a week. In grades 1 through 4, as much as 85 percent of the music curriculum is religious music. Much of the art work that is assigned to the children is of a religious nature. The children are often assigned to write creative stories on religious themes. Religious holidays are observed and emphasized.

The Church, naturally, requires exemplary personal lives from the teachers in the school. All teachers are Christian. In the event a teacher fell from the faith and became a non-believer, that teacher would be terminated. If a teacher failed to conduct her personal life in accordance with standards of Christian morality, she would be terminated.

Additionally, Respondents wish to emphasize that the record below clearly demonstrates that the decision sought to be reviewed herein does not involve any Federal question.

The Trial Court, in interpreting the Louisiana Statute, R.S. 12:1472(12)F, III(a), assiduously avoided all Constitutional issues in recognition of the teaching of this Court in *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d (1979) (Appendix "D", pp. 39, 40). In like manner, the Trial Court found it unnecessary to directly decide the validity or meaning of relevant Federal legislation. Rather, the Court merely found the Congressional legislative history to be un-

persuasive of Petitioner's argument in the face of the plain language of the Louisiana statute. (Appendix "D", pp. 38, 39.)

The holding of the Court of Appeal is likewise totally unsupported by either Federal Constitutional or statutory considerations, and is entirely premised on adequate state grounds. (Appendix "A", pp. 32, 33.)

SUMMARY OF ARGUMENT

The decision of the Louisiana Court of Appeal subject to review herein does not involve any federal question of the Constitutionality of Louisiana statutes under Article I of the Federal Constitution or the application or interpretation of any Congressional legislation, but is rather founded upon adequate state grounds.

Moreover, even should this Court determine that issues of Federal law and the interpretation thereof were in some way reached by the Louisiana Courts, the petition for a review herein should be denied in that the decision of the Louisiana Courts is not in conflict with any decision of this Court, and is furthermore entirely consistent with the decision of the U.S. Fifth Circuit Court of Appeals now before the Court for review. Specifically, the Louisiana Courts properly abstained from a determination of the First Amendment issues raised by Respondents and found a lack of affirmative intent, clearly expressed by the Congress to include

church-related schools within the scope of the State Unemployment Compensation Law, but in so finding, expressed the view that a contrary interpretation might be violative of the Establishment Clause of the First Amendment.

ARGUMENT IN SUPPORT OF DENIAL OF THE PETITION

A. The Want of a Federal Question.

This controversy comes to the Court from a decision of the Louisiana Courts solely involving the applicability, *vel non*, of the Louisiana Employment Security Law to elementary and secondary schools owned and/or operated by churches or religious organizations.

No agency or department of the Federal government was made a party to the proceedings, nor did any seek to intervene or occupy the role of *amici* at any stage of the proceedings.

Although Respondents initially urged various arguments in support of their claims to exemption under the Religion Clauses of both the Federal and Louisiana Constitutions, the Trial Court found it necessary and even essential to avoid reaching these sensitive First Amendment issues in light of the language of *N.L.R.B. v. Catholic Bishop of Chicago*, supra, wherein this Court expressed the view that:

"The absence of an 'affirmative intention of the Congress clearly expressed' fortifies our conclusion that Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers . . . Accordingly, in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."

Also: *United States v. Vuitch*, 402 U.S. 602 (1971)

Unlike the decisional approach taken by the Supreme Court of South Dakota in *St. Martin Evangelical Lutheran Church, et al v. South Dakota*, 290 N.W.2d 845 (1980), (No. 80-120, Sup.Ct.), the Louisiana Court of Appeal chose to abstain from consideration of Congressional or Constitutional issues, and rather was able to perceive adequate state grounds to resolve the case. (Appendix "A", pp. 29-33.)

B. The 1976 Amendments to 26 U.S.C. §3309 Do Not Require State Unemployment Laws to Provide Coverage to

Church-Related Elementary and Secondary Schools.

Petitioner concedes that the legislative history of the 1976 amendment to §3309 is devoid of any language indicating a clearly expressed, affirmative intent to include non-public, church-related schools within the coverage of the Federal Unemployment Law. Nonetheless, Petitioner urges this Court to impute such intent to the Congress solely by inferential supposition, based primarily upon a statement in the Senate Finance Committee Report [S. Rep. No. 1265, 94th Cong., 2d Sess, 8 (1976)] estimating the total number of new employees who would be covered as a result of the repeal of §3309(b)(3) at 242,000. It is thusly argued that, since statistical census figures for 1977 place the total number of all non-public schools teachers at 261,000, and 150,000 thereof were employed by church-related schools, ". . . it is clear that Congress contemplated that the repeal of §3309(b)(3) would bring full [sic.] elementary and secondary schools within the ambit of FUTA." (Appendix "F", p. 90.)

However, the Committee Reports leave it quite unclear whether the Committee or the Congress were aware of this statistical breakdown, or the suggested implications thereof in terms of the scope of coverage of the amendment.

Respondents suggest that this flawed deductive reasoning cannot result in a finding of an "affirmative

intention of the Congress, clearly expressed" that it contemplated the inclusion of church-related schools within the scope of Federal or State Unemployment Compensation Laws. *N.L.R.B. v. Catholic Bishop*, supra.

C. The Inclusion of Church-Related Schools Under Federal and State Unemployment Laws Would Violate the Religion Clauses of the First Amendment.

This Court has long ago given recognition to the fact that the church-related school is an integral part of the mission of any religious organization, so intertwined with its basic purposes and activities as to be incapable of receiving direct federal or state financial assistance.

In *Everson v. Board of Education*, 330 U.S. 1, 9 L.Ed. 711, Mr. Justice Jackson, in his dissenting Opinion, observed the following:

> "I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital part of the Roman Catholic Church. If put to the choice, that venerable institution, I should expect, would forego its whole service for mature persons before it would give up education of the young, and it would be a wise choice."

The Supreme Court has consistently thereafter found a nexus between the church-related school and the religious mission of its sponsoring church. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Meek v. Pittenger*, 421 U.S. 349.

Petitioner argues that the intrusion of the government into the religious affairs of the church will be on an ad hoc basis and minimal in terms of the total number of teachers employed by a school system when viewed in the light of a single teacher's appeal of the justification for her dismissal or termination of employment based upon religious or moral considerations. However, in response to this argument, Respondents suggest that, in the sensitive area of governmental intrusion into religious affairs under either the Establishment of Free Exercise Clauses of the First Amendment, a *de minimis* argument is inappropriate. This Court has considered and rejected similar such arguments in prior First Amendment cases. c.f. *State of New York v. Cathedral Academy*, 434 U.S. 125 (1977).

CONCLUSION

For the reasons assigned herein, the Petition for a Writ of Certiorari to the Supreme Court of Louisiana should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been served on Willie D. Maynor, 1001 North 23rd Street, P.O. Box 44094, Baton Rouge, La. 70804, counsel for Petitioner, by depositing same in the United States Mails, properly addressed and with postage prepaid.

May ____, 1981, at New Orleans, Louisiana.

THOMAS A. RAYER